No. 87-147

Supreme Court, U.S.
FILED
SEP. 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

CARLOS MADRID-PALACIOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly affirmed the conviction in this case without issuing an opinion and without first entertaining oral argument.

2. Whether the district court's instructions on conspiracy were correct.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1987. A petition for rehearing was denied on May 29, 1987 (Pet. App. A3-A4). The petition for a writ of certiorari was filed on July 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner and co-defendant Wolfgang Euler-Markus (Euler) were convicted of conspiracy to distribute and possess with intent to dis-

tribute cocaine, in violation of 21 U.S.C. 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to 25 years' imprisonment and a $500,000 fine (Pet. 7). The court of appeals affirmed (Pet. App. A1-A2).

1. The evidence at trial showed that during October 1984, DEA agents acting in an undercover capacity reached an agreement with Joaquin Perez, co-defendant Wolfgang Euler, and his son Hans to purchase a quantity of cocaine for redistribution. During an October 25, 1984, meeting at the Miami Hilton Hotel, an arrangement was made whereby Perez and Wolfgang Euler would drive Perez's van to a rendezvous point, where it would be turned over to an unidentified person who would take it, load it with the cocaine, and return with it (Tr. 82-83, 799-803). After the cocaine had been loaded, the van would be driven to the hotel where Hans Euler and the undercover agent would be waiting. En route, Wolfgang Euler, who would be following in an automobile equipped with a beeper, would signal to Hans and the agent that the cocaine was on its way (Tr. 82-83, 802-803).

Following the meeting, Wolfgang Euler and Perez took the van to a shopping center where they were met by petitioner and a female companion. After briefly conversing with Perez, petitioner entered Perez's van and drove away. Because of petitioner's evasive driving, the agents were unable to follow him (Tr. 222-224, 242-249).

Later that day, petitioner returned with the van. Upon his arrival, Euler, Perez, and the female left a shopping center restaurant where they had been awaiting his return. Perez then drove off in the van; petitioner, Euler, and the female followed in petitioner's car (Tr. 252-253, 443-444, 815). En route, the party signaled to Hans Euler that they had acquired the cocaine and were returning (Tr. 83, 809).

Upon arriving at the Hilton Hotel, petitioner dropped Euler off and drove from the scene with his female com-

panion. Euler then informed the undercover agent that the cocaine had arrived. After the agent insisted on inspecting it, he was taken to Perez's van, which had also arrived, where he was shown a cardboard box containing seven one-kilogram packages of cocaine. Four of the packages bore the markings "CIA-T" (*e.g.*, Tr. 253-254, 811-813; GXs 5A-5G).

The undercover agent then informed Perez that he was satisfied that the cocaine was on hand, and he agreed to authorize payment. After an associate tendered payment, the Eulers and Perez were placed under arrest. Other officers then stopped petitioner's automobile and placed him under arrest as well. At the time of his arrest, petitioner had in his possession a pouch containing three telephonic beepers, $4,600 in cash, keys to several safe deposit boxes, and a notebook containing jottings relating to narcotics transactions, including the symbol "CIA-T." Law enforcement officers then searched petitioner's apartment and safe deposit boxes pursuant to a warrant. In the course of the searches, the agents discovered almost $120,000 in currency, a Mexican passport bearing petitioner's photograph but issued in another name, and a number of Mexican passport applications, along with petitioner's handwritten instructions about obtaining Mexican passports. In addition, the agents found an eight-page typewritten book that contained procedures to be used in conducting clandestine operations as well as the names and contact numbers of various persons. *E.g.*, GXs 8A, 8C, 11A, 11B, 11E.

2. At trial, the district court admitted the cash and the passport and passport applications that were discovered during the searches of his residence and safe deposit boxes. It excluded the typewritten book on relevancy grounds, except for the page containing the names and numbers of contacts (see Tr. 752-753, 866-873).

At the conclusion of the trial, the district court instructed the jury concerning the elements of the offense of

a narcotics conspiracy. In particular, the court explained (Tr. 1452-1454):

> [U]nder [21 U.S.C. 846] a conspiracy is a combination or an agreement of two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of partnership in criminal purpose in which each member becomes the agent of every other member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey or disregard the law.
>
> The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated between themselves what the details of the scheme were, or what its object and purpose was to be, or the precise means by which the object or purpose was to be accomplished.
>
> * * * * *
>
> In your consideration of the conspiracy offense as alleged in the indictment, you should first determine from all of the testimony and evidence in the case whether or not the conspiracy existed as charged. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the particular defendant under consideration willfully became a member of the conspiracy.
>
> * * * * *
>
> Of course, mere presence at the scene of a crime, and knowledge that a crime is being committed, are not sufficient to establish that a defendant either directly [sic], or aided and abetted a crime, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.
>
> It is the position of [petitioner] that there is no proof before you establishing beyond any reasonable

doubt that he knowingly and intentionally joined a drug conspiracy.

Petitioner lodged no objection to these instructions (see Tr. 1454-1467).

On appeal, petitioner claimed that the trial judge improperly admitted the cash, the typewritten book, and the passport and passport applications that were discovered during the execution of the search warrants. He also argued that the court's instructions on the offense of conspiracy were inadequate. The court of appeals affirmed petitioner's convictions by judgment order and without oral argument.

ARGUMENT

1. Petitioner first contends (Pet. 11-25) that the court of appeals erred in affirming his convictions without affording him an oral argument or issuing an opinion. Although he is generally critical of the practice of deciding cases without oral argument or a written opinion, petitioner's principal contention is that even if that practice is justified in some cases, it was not justified on the facts of his case. That contention is incorrect and in any event is too fact-specific to warrant review by this Court.

a. As the Court explained in *FCC* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 276 (1949), "the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law or indeed even where substantial ones, are raised. Equally certainly it has left wide discretion to Congress in creating the procedures to be followed in * * * judicial proceedings * * *." See also *Glick* v. *Koenig*, 766 F.2d 265, 270 n.3 (7th Cir. 1975) (no absolute right to oral argument); *United States* v. *Marines*, 535 F.2d 552, 556 (10th Cir. 1976) (denial of oral

argument does not violate due process); *George W. B. Bryson & Co.* v. *Norton Lilly & Co.*, 502 F.2d 1045, 1050-1051 (5th Cir. 1974) (same; "[o]ral argument is not always helpful, nor is it the *sine qua non* of fair dispositions"); *NLRB* v. *Local No. 42, Int'l Assoc. of Heat & Frost Insulators & Asbestos Workers*, 476 F.2d 275, 276 (3d Cir. 1973) (en banc) (same).

The Federal Rules of Appellate Procedure authorize the courts of appeals to issue local rules dispensing with oral argument in certain classes of cases, including cases in which "the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." See Fed. R. App. P. 34(a).[1]

These requirements were fully satisfied here. Petitioner maintains (Pet. 14-15) that there was a dispute in the parties' appellate briefs as to whether the typewritten book

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[1] Fed. R. App. P. 34(a) provides:

> *In General; Local Rule.* Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:
>
> Oral argument will be allowed unless
>
> (1) the appeal is frivolous; or
>
> (2) the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process whould not be significantly aided by oral argument.

The Eleventh Circuit Rule 34-3, incorporates these criteria.

detailing how to conduct clandestine operations was admitted into evidence and that oral argument was necessary to solve that issue. The portions of the trial record cited in the government's brief, however, clearly show that only the page containing the names of contacts was admitted and that the remainder was excluded as irrelevant (see Gov't C.A. Br. 20-21; Tr. 752-753, 869-873).[2]

Reference to the trial record was also sufficient to resolve petitioner's claim that, in instructing the jury concerning the offense of conspiracy, the district court failed to delineate the elements of the offense that the government was required to prove beyond a reasonable doubt. The record showed that the jury was instructed that "[i]n your consideration of the conspiracy offense as alleged in the indictment, you should first determine from all of the testimony and evidence in the case whether or not the conspiracy existed as charged" and that, if it concluded that a conspiracy existed, it "should next determine whether or not the particular defendant under consideration willfully became a member of the conspiracy." The court ended the conspiracy instruction by emphasizing that the jury could not return a conviction unless it concluded "beyond a reasonable doubt that [petitioner] was a participant and not merely a knowing spectator," and that petitioner's defense was that the government had failed to show "beyond any reasonable doubt that he knowingly and intentionally joined a drug conspiracy." Tr. 1453-1454.

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[2] Petitioner is incorrect in suggesting (Pet. 15) that the government conceded in its brief in the court of appeals that other portions of the typewritten book were admitted into evidence. Instead, the government's brief explained that only a portion of that document, "that is, a page bearing the names and contact numbers of persons who were also listed in an address book seized from [petitioner] at the time of his arrest, was admitted into evidence" (Gov't C.A. Br. 15 n. 2). See also *id.* at 21 ("[a]fter a lengthy argument, the district court ruled the manual inadmissible, except for a portion of it which was entitled 'distribution of personnel' ").

Petitioner is also incorrect in his assertion (Pet. 17) that, when a court of appeals determines that it is appropriate to dispose of a case without oral argument, it must afford the parties a subsequent opportunity to challenge that determination by stating the reasons that the court is wrong in denying oral argument. Rule 34(a), Fed. R. App. P., merely provides that local rules "shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard." It contains no additional requirement that the parties must be afforded an opportunity to request argument *after* the court has decided to schedule a case for disposition without argument. Eleventh Circuit Rule 28-2(c) requires the parties to include in their briefs "a short statement of whether or not oral argument is desired and, if so, why oral argument should be heard." Petitioner's brief contained a statement requesting argument. The requirements of Fed. R. App. P. 34(a) were thus fully satisfied.

b. Petitioner advances the related argument (Pet. 19-25) that the court of appeals erred in disposing of his claims and affirming his conviction without rendering a written opinion. There is, however, no requirement that an appellate court issue a written opinion in connection with the affirmance of a criminal conviction. See *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (affording the courts of appeals "wide latitude" in deciding whether to write opinions); *Ates* v. *Commissioner of Internal Revenue*, 672 F.2d 468, 469 (5th Cir. 1982); *NLRB* v. *Amalgamated Clothing Workers*, 430 F.2d 966, 971-972 (5th Cir. 1970); Fed. R. App. P. 36. The Eleventh Circuit, moreover, has expressly authorized such disposition in cases where "the evidence in support of the jury's verdict is sufficient" or "judgment has been entered without an error

of law" and "an opinion would have no precedential value * * *." 11th Cir. R. 36-1.[3]

This case satisfies both of these criteria. The evidence was plainly sufficient to support the judgments of conviction, and petitioner has never claimed otherwise. Moreover, the issues petitioner raised in the court below—whether items seized during searches of his residence and safe deposit boxes were properly admitted, and whether the conspiracy instruction was adequate—were insubstantial, fact-specific, and readily susceptible to resolution on the basis of previously settled legal principles.[4]

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[3] Eleventh Circuit Rule 36-1 provides:

AFFIRMANCE WITHOUT OPINION

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without an error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

[4] Petitioner maintains (Pet. 22-24) that the question whether the trial judge properly admitted the large amount of currency that was found in his residence was a substantial issue that required a written opinion. As the government pointed out in its appellate brief, however, it is well settled that the presence of a large amount of unexplained wealth is highly probative of a defendant's involvement in drug trafficking or other illicit activities and is therefore admissible for that purpose. See, *e.g.*, *United States* v. *Young*, 745 F.2d 733, 763 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985) (unexplained and

2. Petitioner also claims (Pet. 26-35) that the district court's conspiracy instruction was inadequate because it failed to include an explication of the elements of the offense that the govenment was required to prove beyond a reasonable doubt.

In the first place, because petitioner did not object to the instruction at trial, its adequacy cannot be raised now. See, *e.g.*, *United States* v. *DeBiasi*, 712 F.2d 785, 792 (2d Cir.), cert. denied, 464 U.S. 962 (1983) (failure to object to adequacy of conspiracy instruction precludes raising objection on appeal); Fed. R. Crim. P. 30. In any event, however, the claim would be without substance even if it had been preserved for appellate review. As we have noted, the district court's instruction concerning the offense of conspiracy contained a thorough explanation of the elements of the offense, including the necessity of finding that the conspiracy existed as charged and that "[petitioner] willfully became a member of the conspiracy." The portion of the court's instruction quoted above made it abundantly clear that petitioner's participation in the conspiracy had to be established beyond a reasonable doubt (Tr. 1453-1454). Any possible doubt on that score would have been allayed by the court's general instructions

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unreported wealth properly considered by jury as evidence of participation in drug trafficking conspiracy); *United States* v. *Chagra*, 669 F.2d 241, 255-256 (5th Cir.), cert. denied, 459 U.S. 846 (1982) (same); *United States* v. *Barnes*, 604 F.2d 121, 147 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980) (same; collecting cases); *United States* v. *Viserto*, 596 F.2d 531, 536 (2d Cir.), cert. denied, 444 U.S. 841 (1979) (proof of availability of unexplained cash is admitted to show that it was derived from ill-gotten gains); see also *United States* v. *Cepeda*, 768 F.2d 1515, 1518 (2d Cir. 1985) (collecting cases). Consequently, there was no reason to rehearse that issue anew in a written opinion.

regarding the government's burden of proof on all elements of the offenses charged (see Tr. 1446-1447, 1449, 1457). Taken together, the court's instructions clearly advised the jury that in order to justify a conviction on the conspiracy count, the government had to prove beyond a reasonable doubt that petitioner intentionally became a member of the conspiracy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1987

U.S. GOVERNMENT PRINTING OFFICE 1987—181-483/60027